Supreme Court, U.S.
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No. 94-1182

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

CONNIE CUTINELLO, etc., *et al.*,
Petitioners,

v.

DOUGLAS L. WHITLEY, etc., *et al.*,
Respondents.

On Appeal From the Supreme Court Of
The State of Illinois
There On Appeal From The
Circuit Court Of Cook County, Illinois

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ORAL ARGUMENT REQUESTED

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether Chapter 55, Section 5/5-1035.1 of the Illinois Compiled Statutes violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

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CONSTITUTIONAL PROVISION INVOLVED

Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV, §1

STATUTORY PROVISIÓN INVOLVED

The state statute involved provides in part:[1]

> The County board of the counties of DuPage, Kane and McHenry may, by an ordinance or resolution adopted by an affirmative vote of a majority of the members elected or appointed to the county board, impose a tax upon all person engaged in the county in the business of selling motor fuel, as now or hereafter defined in the Motor Fuel Tax Law, at retail for the operation of motor vehicles upon public highways or for the operation of recreational watercraft upon waterways. The tax may be imposed, in half-cent increments, at a rate not exceeding 4 cents

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[1] The verbatim text of the entire statute has been lodged with the Clerk of this Honorable Court.

> per gallon of motor fuel sold at retail within the county for the purposes of use or consumption and not for the purpose of resale. The proceeds from the tax shall be used by the County solely for the purposes of operating, constructing and improving public highways and waterways, and acquiring real property and right-of-ways for public highways and waterways within the county imposing the tax . . .
>
> 55 *ILCS* 5/5-1035.1

The above section is the portion of comprehensive legislation that is being challenged by the Petitioners.

STATEMENT OF THE CASE

Respondent County of Kane (hereinafter "Respondent") adopts the "Statement of Case" set forth by Plaintiff-Petitioners (hereinafter referred to as "Petitioners") as set forth on pages 2 and 3 of their Petition for Writ of Certiorari (hereinafter referred to as "Petition").

ARGUMENT

The Petition for Writ of Certiorari to the Illinois Supreme Court in order to review its decision in *Cutinello v. Whitley*, 161 Ill.2d 409, 641 N.E.2d 360 (1994) should be denied. The statute at issue does not involve a suspect classification and does not infringe upon a fundamental constitutional right. Accordingly, on a rational-basis review, a classification comes to this Court bearing a strong presumption of validity. *Federal Communications Commission v. Beach Communications Inc.*, 124 L.Ed.2d 211, 222 (1993) (hereinafter referred to as *Beach*) *quoting Lyng v. Automobile Worker's*, 485 US 360, 370 (1988). Petitioners have the burden "to negative every conceivable basis which might support" the classification. *Beach, supra,* at 124 L.Ed.2d 211, 222 *quoting Lehnhausen v Lake Shore Auto Parts Co.* 410 US 356 (1973). Petitioners have failed to meet this burden.

A. INTRODUCTORY COMMENTS

This case is controlled by this Court's recent decision

in *Beach.*

Like the legislation reviewed in *Beach*, the statute at issue in the instant case is part of economic policy adopted by a legislative body that neither proceeds along suspect lines nor infringes upon any fundamental constitutional right. Therefore, as *Beach* instructs, the critical inquiry is whether there is "any reasonably conceivable state of facts that could provide a rational basis for the classification." *Beach, supra,* at 124 L.Ed.2d 211, 221.

B. THE MOTOR FUEL TAX IS CONSTITUTIONAL

The rationale for the challenged legislation, which constitutes only one component of the entire package of legislation dealing with statewide transportation assistance issues (1989 Ill. Laws 86-16, hereinafter Public Act 86-16), is to provide Kane, DuPage and McHenry Counties with the option to enact a motor fuel tax to enable those counties to address traffic congestion and transportation problems which

accompanied the obvious and rapid development occurring in those counties. The Illinois Supreme Court noted that even the data presented by Petitioners supported the classification in question, stating ". . . Plaintiffs' own statistics show that the worst congestion problems exist in the northeastern part of the State. They also show that the Counties [Kane, McHenry and DuPage] rank high in terms of urban congestion based on miles of congested roadway and the cost of relieving the congestion." *Cutinello* at 161 Ill.2d 407, 422, 641 N.E.2d 360, 366.

The essence of Petitioners' argument is that because the legislature chose to use the names of specific counties, the classification in question violates the Equal Protection Clause. This reasoning ignores the principle which presumes that the legislature ". . . acted conscientiously and did their duty in making a survey of the conditions prevailing in the (counties) of the State before enacting the classification legislation." *Cutinello* at 161 Ill.2d 409, 421 N.E.2d 360, 365 *quoting In Re Belmont Fire Protection District,* at 111 Ill.2d 380, 489

N.E.2d 1385, (1986). Clearly, the Illinois Legislature could have articulated a classification in order to avoid identifying the counties by name (i.e. "those counties having a population less than 'x,' having 'x' percentage of growth within 'x' miles of a county in excess of 'x' population.") However, instead of fashioning the obscure, the Illinois Legislature chose to be clear and direct. The legislature should be commended, not penalized, for using plain language not susceptible to misinterpretation.

Petitioners also contend that the classification in question should be held unconstitutional because, in Petitioners' opinion, other counties should have been included in the classification.[2] This Court has recognized that a

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[2] Petitioners note that "the equal protection clause prevents states from arbitrarily granting privileges to politically powerful local governments or penalizing the weak or disfavored." (Petitioners' Brief, at 18.) Petitioners' argument, that Lake County was excluded from the legislation in question because it was not politically powerful, or in the converse, was politically weak or disfavored, is disingenuous. This is evident by Petitioners' own recitation of the legislative debates in which it is apparent that Lake County *was* originally included in the legislation, but at the request of Illinois legislators representing Lake County, it was deleted from the so-called "privileged group." (Petitioners' Brief, at 18.) Thus

classification statute "requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some point is a matter for legislative, rather than judicial, consideration." *Beach, supra,* at 124 L.Ed.2d 211, 223. Petitioners urge this Honorable Court to substitute their judgment for that of the Illinois Legislature.

Petitioners also indicate that, in their opinion, the inclusion of additional counties may make the legislation pass constitutional scrutiny.[3] This type of endless second-guessing

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Petitioners' contention that only the politically powerful were included in the classification they contend is unconstitutional is baseless, and their argument that equal protection was violated in excluding Lake County is contrary to the underlying principles of equal protection. Lake County specifically *rejected* the "protection" which Petitioners are so eager to bestow upon it in order to invalidate legislation they dislike.

[3] At one point in their Petition, Petitioners argue that Lake County, and possibly Will County, would be necessary, in their opinion, to make the classification constitutional. (Petitioners' Brief, at 15) Later, relying upon a study conducted by the Illinois Department of Transportation, they argue that perhaps St. Clair and Madison Counties might also be essential to a valid classification. (Petitioners' Brief, at 17)

underscores the necessity for legislative direction, not judicial intervention. As this Court unanimously held in *Beach*, "equal protection is not a license for courts to judge the wisdom, fairness or logic of legislative choices."[4] *Beach, supra,* at 124 L.Ed.2d 211, 221.

"A classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legislative governmental purpose." *Heller v. Doe,* 125 L.Ed.2d 257, 270 (1993). This Court also observed in the *Heller* case that "courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it 'is not made with mathematical nicety or because in practice it results in some inequality.'" *Id.* at 271.

Petitioners contend that the Illinois Supreme Court's

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[4] Justice Stevens concurred in the judgment.

decision in *Cutinello* condones ". . . any speculation, even if idle or false" in upholding a classification."[5] (Petitioners' Brief, at 5, *Cutinello 94-1184*) Petitioners' rather arrogant criticism of the Illinois Supreme Court's analysis of the classification in question is wholly inappropriate in light of the principles enunciated by this Court in *Beach.*[6] In *Beach*, this Court made clear its respect for, and its deference to, legislative decisions made by state legislators most familiar with the issues and problems facing their constituency. In order to enforce this deferential posture, this Court held that ". . . legislative choice is not subject to courtroom fact-finding

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[5] "One could conceive that Chicago is the smallest city in Illinois - but it is not. One could conceive that Cook County is a rural county, but it is not." (Petitioners' Brief, at 5.)

[6] Petitioners criticize the Illinois Supreme Court for relying upon federal cases involving equal protection challenges to legislation. Petitioners themselves avoid any reliance on federal cases in their argument that the classification they challenge is violative of the Fourteenth Amendment to the U.S. Constitution. They refer to this Court's decision in *Beach* only in passing, suggesting that federal cases should not be used as a "mantra to conclude or obviate analysis of the specific legislation involved." (Petitioners' Brief, at 18.) Instead Petitioners rely heavily upon Illinois Supreme Court and appellate court cases which were decided prior to this Court's dispositive ruling in *Beach*. (Petitioners' Brief, at 11-13.)

and may be based on *rational speculation unsupported by evidence or empirical data.*" *Beach, supra,* at 124 L.Ed.2d 211, 222, (emphasis added). Thus the issue before the Illinois Supreme Court was whether that court could have found that there was *any* rational relationship, even if "unsupported by evidence or empirical data" between the classification in question and a legitimate governmental purpose.

In its analysis of this issue, the Illinois Supreme Court also relied on this Court's ruling in *Beach* for the proposition that since it could not require a legislature to articulate it reasons for enacting a statute, it would therefore be ". . . irrelevant for constitutional purposes whether the conceived reason for the challenged distinction *actually motivated* the legislature. (citations omitted) (emphasis added) Thus the absence of 'legislative facts' explaining the distinction 'on the record' has no significance in rational-basis analysis." *Beach, supra,* at 124 L.Ed.2d 211, 222.

Analyzing the challenged legislation using the principles

set forth by this Court, it is clear that the Illinois Supreme Court correctly found that the challenged classification was constitutional. Petitioners argue that the population rate of growth data supplied by Respondents below, as set forth in what Petitioners refer to as the "Fry affidavit," showed that the three counties in question had the highest *percentage* increase in population. However, if viewed in terms of absolute numbers, as opposed to percentages, Petitioners contend that the result would have been different. (Petitioners' Brief at 21.) In determining funding for transportation related issues, the *rate* of growth is arguably of far greater importance than growth in terms of actual numbers. For instance, while a population increase of 100,000 people in Cook County might result in only a 2% growth rate, that same 100,000 increase in population in Kane County would represent almost a 30% growth rate, thereby making the transportation concerns of far greater magnitude. While Petitioners argue that the legislature should have used different reasoning in arriving at

the classification in question, this Court in *Beach* made it clear that "[T]he assumptions underlying these rationales may be erroneous, but the very fact that they are 'arguable' is sufficient, on rational-basis review to 'immunize' the congressional choice from constitutional challenges." *Beach, supra,* at 124 L.Ed.2d 211, 225 *quoting Vance v. Bradley,* 440 U.S. 112, (1979).

Petitioners also argue that "even supposing that the Counties have selected the appropriate measure of 'growth' . . . nothing in the Counties' argument shows that its data was available to the General Assembly when Public Act 86-16 was enacted or that the data had even been prepared by that time." (Petitioners' Brief, at 22.) It is *irrelevant*, for constitutional purposes, whether the conceived of reason *actually* motivated the legislature, and since legislative facts explaining the reason for legislative distinctions are *not* required, Petitioners' argument that there was no evidence that the data in question was available to the General Assembly when it enacted Public

Act 86-16 is meritless.

This Court's *Beach* analysis was preceded by its holding in *Kadrmas v. Dickenson Public Schools,* 487 U.S. 450, (1988). There this Court stated:

> We are not bound by explanation of the statute's rationality that may be offered by litigants or other courts. Rather, those challenging the legislative judgement must convince us 'that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.'

Id. at 487 U.S. 450, 463.

The jurisprudence of this Court clearly indicates that under the rational-basis test, the legislation in question is constitutional.

CONCLUSION

The decision of the Illinois Supreme Court in *Cutinello* in no way conflicts with applicable decisions of this Court

involving the Equal Protection Clause of the Fourteenth Amendment. The Illinois Supreme Court correctly followed each principle of law enunciated by this Court. Therefore, Petitioners' Petition for Writ of Certiorari should be denied.

Dated: March 6, 1995

Respectfully submitted,

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